IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.492 of 2000

Date of decision : August 29, 2007

M/s Khalsa Boot House **...Appellant.**

Versus

Yash Pal Singh **…Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. B.B. Vaid, Advocate.

For the Respondent : Mr. Anshul Bansal, Advocate.

Surjit Singh, Judge(Oral)

Appellant filed a complaint under Section 138 of the Negotiable Instruments Act against the respondent. The matter was listed by the trial Court for recording preliminary evidence that is to say for recording the evidence before the summoning of the accused, for 8.6.1999. That day the complainant did not appear. His counsel also did not put in appearance. So, the complaint was dismissed. It is against this order that the present appeal is directed.

2. I have heard the learned counsel for the parties.

3. It is submitted on behalf of the appellant that the trial Magistrate dismissed the complaint in default of appearance of the complainant, purportedly under Section 256 of the Code of Criminal Procedure, because the case was a summons case, even though the Magistrate has made no mention of the provision of the Code of Criminal Procedure under which the said order had been passed and, therefore, the order is to be deemed to be one of acquittal. This

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Whether reporters of the local papers may be allowed to see the judgment?

submission appears to be well founded because admittedly the punishment for the offence allegedly committed by the respondent was one year (maximum) at the time when the impugned order was passed in the year 1999. For applicability of the provision of Section 256 of the Code of Criminal Procedure there have to be two things. First, the absence of the complainant and second the matter should be listed either for the appearance of the accused or for any proceedings subsequent to the appearance of the accused.

4. In the present case, the mater was listed for recording the preliminary evidence of the complainant or say a stage before the accused could even be ordered to be present in the Court. In other words, the matter was not listed for the appearance of the accused or for some proceedings subsequent to the appearance of the accused. Thus, the second condition for the attraction of the provision of Section 256 of the Code of Criminal Procedure did not exist and, hence, the order is illegal and without jurisdiction. Consequently, appeal is accepted. Impugned order is set aside and the matter is remanded to the concerned Judicial Magistrate for disposal in accordance with law. Parties are directed to appear before the trial Court on 12th September, 2007. Record be sent to the trial Court with a copy of this order immediately.

5. Appeal stands disposed of.

August 29, 2007(sd) **(Surjit Singh), J**